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An unending variety of topics

Thursday, January 19, 2006

Some recent patent news

The famous (among patent attorneys) U.S. claim construction case *Phillips v. AWH* may get even bigger if the Supreme Court decides to hear AWH's appeal. AWH wants the Court to address the question of whether the Federal Circuit's review of claim interpretations on appeal should be done from scratch, which is the Federal Circuit's view, or with some degree of deference to the lower court's interpretation. The Federal Circuit has been notorious for overturning over half of lower court interpretations of claims language. This seems to imply a rather large degree of randomness in the way claims are interpreted. My opinion is that this high uncertainty may be a consequence of the inherent difficulty of defining claims to chunks of technology "space". If that's the case, deferring to the lower court would not make this uncertainty go away, it would simply hide it, giving to our patent laws a false sense of integrity. Deference would at least make our arbitrary patent decisions more efficient. Here are links to the briefs in front of the Court. Harold Wegner says to expect the Court's decision on whether it will hear the case on February 21st.

Meanwhile, the Enlarged Board of Appeal of the European Patent Office has decided an issue of law similar to that in the U.S. *Metabolite* case which is now in front of our Supreme Court. The EPOs' decision will allow drafters of European patents to use, to some extent, the technique of gratuitous elements in order to get around the ban European Patent Convention Article 52(4) places on patents for "diagnostic methods practiced on the human or animal body[.]" European law also bans software patents, if you are foolish enough to believe the plain language of the statute.

Today the Wall Street Journal has a good article on *RIM v. NTP*, where the U.S. Federal Circuit decided that a network system that would infringe a U.S. patent if entirely within the United States would also infringe a patent if one (at least) of the claim elements was located outside the United States but the users and thus the locus of control (so reasoned the court) were located within the United States. However, for a similar method claim, all the steps of the procedure had to be performed within the United States in order for the procedure to infringe the method claim. The WSJ's article is available today online.

Posted by Nick Szabo at 8:53 AM

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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